



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Uwezo Microfinance Bank v Munoru (Civil Application
E231 of 2020) [2022] KECA 1167 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1167 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E231 OF 2020
JM MATIVO, JA
OCTOBER 21, 2022**

BETWEEN

UWEZO MICROFINANCE BANK APPLICANT

AND

JANE NYOKABI MUNORU RESPONDENT

(An application for extension of time to file a Notice of Appeal against the judgment of the Environment and Land Court at Nairobi (Hon. Justice Eboso) in Thika ELC Case No. 739 of 2017 dated/delivered on 3rd February 2022)

RULING

1. By an application dated June 28, 2022, Uwezo Microfinance Bank (the applicant) seeks leave to file a notice of appeal out of time against the judgment delivered in Thika ELC No 739 of 2017 on February 3, 2022, Jane Nyokabi Munoru v Uwezo Microfinance Bank Ltd by Eboso J. It also prays for extension of time within which to file and serve the intended appeal and such other orders as the court shall deem fit. Lastly, it prays for costs of the application.
2. The key grounds in support of the application are two-fold: - one, that the failure to lodge the notice of appeal was not intentional and or willful but was due to the demise of its then advocate. Two, it is in the interests of justice that the orders sought be allowed. The grounds are explicated in the supporting affidavit of Joseph Amalemba, the applicant's Debt Recovery Manager dated June 28, 2022. The salient points are: -
 - (i) that the applicant was not aware of the judgment until April 11, 2022 owing to the demise of its advocate the late Wilkista Nyangito.
 - (ii) That the intended appeal raises triable issues; (iii) that the delay is not inordinate and the applicant stands to suffer prejudice if the orders are refused;



- (vi) it is in the interests of justice that the application be allowed.
3. In opposition to the application, the respondent filed her replying affidavit dated July 14, 2022 stating that :-
- (a) the applicant was represented by an advocate at the time the judgment was delivered who applied for a copy of the judgment;
 - (b) the applicant has not disclosed that it filed a notice of appeal dated May 17, 2022 without leave of the court;
 - (c) the applicant has not disclosed how it came to learn about the judgment nor has it explained the 2 ½ months delay;
 - (d) the draft memorandum of appeal does not raise arguable grounds;
 - (e) the applicant did not apply for the maker of the documents to appear during pre-trial nor did it object to the production of the document;
 - (f) the applicant did not tender evidence;
 - (g) the applicant was only prompted by the taxation notice
 - (h) the applicant has not offered security for the due performance of the decree;
 - (i) that the applicant is sickly, paralyzed and had to be wheeled to court during the hearing;
 - (j) without prejudice, the applicant be ordered to deposit in court the award of Kshs 500,000/= plus substantial amount of costs.
4. In his submissions, the applicant's counsel submitted that the reasons for failure to file the notice of appeal in time were beyond their control, that the advocate on record died on December 18, 2022. He cited *Hon John Njoroge Michuki & another v Kentazuga Hardware Limited [1998] eKLR* which held that leave to file a notice of appeal should be liberally granted unless an applicant is guilty of unexplained and inordinate delay.
5. As to whether the applicant has an arguable appeal with chances of success, counsel cited *Moroo Polymers Limited v Wilfred Kasyoki Willis [2019] eKLR* which held that an intended appeal need not succeed. Additionally, counsel submitted that the applicant will suffer prejudice if the application is refused because its right under article 50 of the *Constitution* is at risk. He urged the court to be guided by article 159 (2) (d) of the *Constitution* which obligates courts to administer justice without undue regard to procedural technicalities. Lastly, counsel cited *Ncharpai Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] e KLR* which held that the right of appeal or the right to be heard which are constitutionally entrenched right can only be withheld in exceptional circumstances.
6. The respondent's counsel's submissions are essentially a replication of the replying affidavit, so it will add no value to rehash it here. It will suffice to state that counsel cited *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others {2014} eKLR* which set out considerations to guide the court in exercising its discretion in cases of this nature:
- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court



- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
7. He also cited *Bookpoint Limited v Guardian Bank Limited & another* [2021] eKLR in support of the holding that a notice of appeal filed out of time is invalid and *Motorways Kenya Limited v Kenya Engineering Workers Union [2018] eKLR* which held that a delay, even for one day, ought to be explained otherwise it is rendered inordinate. Additionally, counsel argued that the intended appeal does not raise arguable grounds because during the trial, the applicant never applied for the maker of the document to be called or tender evidence in rebuttal. Lastly, he argued that the respondent risks suffering prejudice.
8. The right of appeal is a statutory right. The contours of this right, including the circumstances in which such right can be exercised, by whom it can be exercised, the period within which it should be exercised and on the grounds on which an appeal may be favourably considered are determined by the provisions of the statute creating such right. Because the right to prefer an appeal is a right created by statute, no party can file an appeal against any judgement, decree or order as a matter of course in the absence of a suitable provision of some law conferring on the party concerned the right to file an appeal against any judgement, decree or order. In appropriate cases a party may be held to have become disentitled from enforcing the right of appeal which he may otherwise have.
9. Rule 4 of the *Court of Appeal Rules, 2022* provides: -
- The court may, on such terms as may be just, by order, extend the time limited by these rules, or by any decision of the court or of a superior court, for the doing of any act authorized or required by these rules, whether before or after the doing of the act, and a reference in these rules to any such time shall be construed as reference to that that time as extended.
10. An applicant for extension of time to file a notice of appeal out of time must show good and substantial reasons for the delay, and, prima facie good cause why the intended appeal should be heard. Whilst the first leg requires a satisfactory justification, the second leg only requires one to show that the grounds of appeal are arguable. It is upon satisfaction of both the above that the court will use its discretion to grant the application.
11. The word "may" is deployed in the above rule. To begin with, the rule is merely permissive and intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bona fide is imputable. Thus, this court accepts that there can be instances where the court should tolerate a delay; equally there would be cases where the court must exercise its discretion against an applicant for want of any of these ingredients or where it does not reflect "good cause" as understood in law. It is the understanding of this court that the expression "for good cause" implies the presence of legal and adequate reasons. And, the word means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which suffices to accomplish the purpose intended in the light of existing circumstances and when viewed



from the reasonable standard of practical and cautious men. The “good cause” should be such as it would persuade the court, in exercise of its judicial discretion, to treat the delay as an excusable one. The above provision gives the courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated. The person applying for leave to appeal out of time should show that besides acting bona fide, the applicant had taken all possible steps within his/ her power and control and had approached the court without any unnecessary delay. The test is whether or not a cause is good enough that it could not have been avoided by the person by the exercise of due care and attention.

12. The decision to grant an application for extension of time is a discretionary power. This discretionary power, however, is judicial in nature and must be confined to the rules of reason and justice. It is also required that all relevant factors are considered. (See *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* {2014} eKLR (*supra*)).
13. In granting leave, the court has to balance the competing interests of the applicant with those of the respondent. (See *M/S Portreitz Maternity v James Karanga Kabia Civil Appeal No 63 of 1997*). Filing an appeal within a period of limitation is the rule and condonation of delay is an exception. While condoning the delay, the courts must be cautious and only on genuine reasons, the courts are empowered to condone the delay. The discretion to condone the delay is to be exercised judiciously and by recording reasons. The reasons furnished for condonation of delay must be candid and convincing. Therefore, the condonation of delay cannot be claimed as a matter of right and only on genuine reasons, the delay is to be condoned and not otherwise. In the event of condoning the huge delay in a routine manner, the courts are not only diluting the law of limitation but unnecessarily encouraging this kind of lapses. Therefore, reasons which are all acceptable alone must be a ground for condonation of delay, and flimsy, false and casual reasons cannot be taken for the purpose of condoning the huge delay.
14. As a matter of general principle, it is entirely in the discretion of the court whether to grant or refuse an application for extension of time. That discretion is, however, judicial and so, it must be exercised according to the rules of reason and justice, the deciding factor being the showing of “good cause” by the applicant. As to what constitutes “good cause” is dependent upon a variety of factors which may include the length of the delay, the reasons for the delay, the chances of the appeal succeeding if the application is granted and; the degree of prejudice to the respondent if the application is granted.
15. For delay to be condoned, the reasons adduced must be properly pleaded, convincing and acceptable and explanation should be offered for condonation of the delay. Unless a proper explanation is offered, the courts will not exercise its discretion in the proper perspective to advance substantial justice.
16. The question here narrows to whether the delay in this case is excusable.

Excusable delays are delays that are unforeseeable and beyond the control of the party. Non-excusable delays are delays that are foreseeable or within the party's control. Obviously, the distinction between these two is significant in that it determines whether a party is liable for the delay.
17. In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are inter-related; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion.
18. In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore



provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success.

19. Significant with a determination of such applications is that condonation cannot be had for the mere asking, and a party is required to make out a case entitling it to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default. Also vital is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so.
20. The applicant states that the failure to lodge the notice of appeal was not intentional but was due to the demise of its then advocate. It states that it was not aware of the judgment until April 11, 2022 owing to the demise of its advocate the late Wilkista Nyangito. Considering the explanation for the delay, I am unable to fault the present advocate or the applicant for the delay.
21. The applicant argued that it has an arguable appeal. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court. (See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] e KLR*). I find that the applicant has satisfied this test.
22. In conclusion, I allow the applicant's application dated June 28, 2022 and extend the time for filing the notice of appeal by a period of 7 days from the date of this ruling. The applicant is also granted an extension of 30 days from the date of this ruling to file and serve its intended appeal. I further order that the applicant files and serves the intended appeal within 30 days from the date of this order. No orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER 2022.

J MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

